

**28.1383(A)(1)-4**

**Aggravated [Driving/Actual Physical Control] While There Is A Drug In The Defendant's Body While [License/Privilege To Drive] [Suspended/Canceled/Revoked/Refused/Restricted]**

The crime of aggravated [driving/actual physical control] with an alcohol concentration of [0.10][0.08] while [license to drive/ privilege to drive] is [suspended/ canceled/ revoked/ refused/ restricted] requires proof of the following:

1. The defendant committed the offense of [driving/actual physical control] while under the influence; and
2. The defendant's [driver's license to drive/privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time the defendant was [driving / in actual physical control].
3. The defendant knew or should have known that the defendant's [driver's license to drive/ privilege to drive] was [suspended/ canceled/ revoked/ refused/ restricted] at the time of [driving/ being in actual physical control].

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**SOURCE:** A.R.S. §§ 28-1383(A)(1) & -1381(A)(3) (statutory language as of September 1, 2001).

**USE NOTE:** Use this instruction in conjunction with Instruction 28.1381(A)(3).

Use language in brackets as appropriate to the facts. The under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. See *State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

The State must prove that the defendant knew or should have known that the license was suspended or revoked. *State v. Agee*, 181 Ariz. 58, 61, 887 P.2d 588, 591 (App. 1994), *State v. Rivera*, 177 Ariz. 476, 479, 858 P.2d 1059, 1062 (App. 1994). The knowledge of suspension or revocation may be presumed if the notice of suspension or revocation was mailed to the last known address pursuant to A.R.S. §§ 28-448 and 28-3318. See Instruction 28.3318. This permissive presumption may be rebutted by presenting some evidence that the defendant did not know that the license was suspended or revoked. *State v. Jennings*, 150 Ariz. 90, 94, 722 P.2d 258, 262 (1986).

**COMMENT:** Driving under the influence can be established by either direct or circumstantial evidence of driving, or by establishing that the defendant was in actual physical control of a vehicle. The offense of driving while a license or privilege to drive was suspended, canceled, or revoked (hereinafter driving on a suspended license) requires either direct or circumstantial evidence of driving. There is no actual physical control element for driving while on a suspended license. Therefore, if actual physical control is part of the greater charge of aggravated driving under the influence, driving on a suspended license is not a lesser-included offense. *State v. Brown*, 195 Ariz. 206, 208, 986 P.2d 239, 241 (App. 1999). Because aggravated driving under

the influence can occur on any property and driving on a suspended license can only occur on a public highway, driving on a suspended license is not a lesser-included offense unless the charging document establishes that the driving occurred on a public highway. *State v. Brown*, 195 Ariz. 206, 209, 986 P.2d 239, 242 (App. 1999).

A.R.S. 28-1383(A)(1) “prohibits a person from, among other activities, committing a DUI offense ‘while a restriction is placed’ on her right to drive because of a prior DUI offense.” *State v. Skiba*, 199 Ariz. 539, 19 P.3d 1255, 1257 (App. 2001).

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